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85-1773

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHARLES M. OBERLY, III and JOHN E. WILSON, III,
Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees.

JURISDICTIONAL STATEMENT

On Appeal from the United States Court
Of Appeals for the Third Circuit

CHARLES M. OBERLY, III
Attorney General

FRED S. SILVERMAN
State Solicitor

JOHN J. POLK
Deputy Attorney General
Department of Justice
Carvel State Building
Wilmington, Delaware 19801

COUNSEL FOR APPELLANTS

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

May a federal district court invalidate a state law under the preemption doctrine by relying on the Environmental Protection Agency's failure to promulgate an applicable regulation when Congress has stated that preemption occurs only "after the effective date of a regulation?" [1]

THE PARTIES

Charles M. Oberly, III, Attorney General of the State of Delaware, and John E. Wilson, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware, ("the State Officials") are the appellants in this appeal. They were also the appellants before the United States Court of Appeals for the Third Circuit whose judgment is sought to be reviewed.

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1. Prior to the district court's decision in this case, the Delaware Noise Control Act, 7 *Del. C.* c.71, condemned excessive noise in residential neighborhoods. Unfortunately for the people of Elsmere, Delaware, they lived near a railyard operated by railroads of the Chessie System. Some lived as close to the site as 100 yards. The residents and the railroad had coexisted in peace for more than 100 years. In October 1982, however, the railroads changed the character of the site. They converted the site into a terminal for "piggyback operations" and, in so doing, caused large numbers of refrigerated trailers to be parked in areas adjacent to the residential properties. One affiant compared the noise from these trailers to "standing next to a highway as a stream of trucks passed in incessant review." A-94. When state law enforcement officials attempted to enforce the Delaware Noise Control Act, a federal district court decreed that the law violated the Constitution. The court reasoned that the Environmental Protection Agency ("EPA") had considered but failed to enact federal standards governing noise from stationary refrigerated trailers. In so doing, the court concluded that the EPA had preempted all state regulation of such noise by its non-regulation. Delaware challenges that ruling as oxymoronic. Congress had conferred preemptive authority on existing federal regulations, not those which the EPA failed to bring into existence. For these reasons, the appellants consider questions concerning the EPA's failure to enact an applicable regulation subsidiary to the articulated question. *See* Supreme Court Rule 15.1(a).

The appellees here and below are the Baltimore & Ohio Railroad Company, the Baltimore & Philadelphia Railroad Company, Mount Clare Properties (Delaware), Inc., and Chessie Motor Express ("the Chessie group").

At the request of the Third Circuit, the General Counsel of the EPA, or more precisely, the Land and Natural Resources Division of the United States Department of Justice submitted a memorandum of law addressing the EPA's position concerning the preemptive effect of 42 U.S.C. §4916. *See Baltimore & Ohio Railroad v. Oberly*, 782 F.2d 29, 30 (3rd Cir. 1986). The EPA is not, however, a party of record in this proceeding.

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OPINIONS BELOW

In a three page opinion dated January 27, 1986, the United States Court of Appeals for the Third Circuit affirmed the district court's invalidation of the Delaware Noise Control Act, 7 *Del. C.* c.71. The opinion is reported as *The Baltimore & Ohio Railroad v. Oberly*, 782 F.2d 29 (3rd Cir. 1986).

The district court had enjoined the State officials from enforcing that Act on April 9, 1985. That court's decision appears as *Baltimore & Ohio Railroad Company v. Oberly*, 606 F.Supp. 1340 (D.Del. 1985). The court had declared the Act unconstitutional in the context of the Chessie group's motion for a preliminary injunction. At oral argument before the Third Circuit, however, the parties stipulated on the record that the court should consider the issue as if it had been appealed from an order imposing a permanent injunction. Appendix ("A- ") 24. The court accepted that stipulation.

JURISDICTION

A federal district court has enjoined state law enforcement officials from enforcing the Delaware Noise Control Act on the grounds that it violates the Supremacy Clause of the Constitution of the United States.[2] Thus this Court has jurisdiction of this appeal under 28 U.S.C. §1254(2).

Jurisdiction in the district court rested on federal question jurisdiction under 28 U.S.C. §1331. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14 (1983).

The Third Circuit assumed jurisdiction over the appeal from the grant of a preliminary injunction pursuant to 28 U.S.C. §1291(a)(1). Once the parties conceded that the Third Circuit could treat the matter as if appealed from an order imposing a permanent injunction, the continued jurisdiction of the court of appeals rested on 28 U.S.C. §1291.

The Third Circuit issued its opinion and order on January 27, 1986. A-18. The State Officials filed their notice of appeal

2. The Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S.Const. art. VI, cl. 2.

with the United States Court of Appeals for the Third Circuit on April 11, 1986. A-23.

STATUTES INVOLVED

There are two statutes involved in this appeal: 42 U.S.C. §4916(c) and 7 *Del. C.* §7101 *et seq*. The federal statute, which the lower courts considered preemptive despite the absence of a federal standard applicable to noise from parked refrigerated trailers, states:

> (1) Subject to paragraph (2) but notwithstanding any other provision of this chapter, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.
>
> (2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on the levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

42 U.S.C. §4916(c).

The Delaware statute and the regulations promulgated thereunder are too lengthy to be reproduced in this jurisdictional statement. They appear in the Appendix at A-25, 39.

STATEMENT OF THE CASE

1. Facts Material To The Consideration Of The Question Presented

The facts material to consideration of the issues raised in this appeal have never been in dispute. Many of these facts relate to the Chessie group's operation which the State officials seek to regulate. The parties stipulated to most of those facts which appear in this jurisdictional statement. A-51-76. The remaining facts consist of the regulatory history concerning the promulgation of federal railroad noise emissions standards by the Environmental Protection Agency ("EPA"). The regulatory history, of course, is a matter of undisputed public record.

a. The Chessie Group's Operation

Prior to December, 1983, the Baltimore & Ohio and the Baltimore & Philadelphia Railroads used a site adjacent to the residential communities of Elsmere, Roselle, and Brack-Ex as a switching yard.[3] This site was known as the Wilsmere Yard. Noise from switching operations might include sound from the movement of locomotives and railcars, from the application of retarders to railcar movement, and from the coupling of railcars. These operations are limited in duration. As a result, the noise from these operations is intermittent.

In October, 1982, the Chessie group began increasingly to use the Wilsmere Yard for intermodal operations. These operations involve the transfer of trailers to and from railroad flat cars. In the railroad industry, such operations are known by the acronyms TOFC and COFC.[4]

The Chessie group's intermodal operation at the Wilsmere yard follows typical TOFC/COFC procedures. Truck-tractors operated by either Chessie Motor Express or some other trucking firm haul trailers or containers to parking areas alongside the

3. A switching yard or switchyard consists of several side tracks on which railcars from arriving trains are separated and from which railcars for departing trains are collected. *See* Webster's New Twentieth Century Dictionary 1845 (2d ed. 1959); *Baltimore & D.C. W. Ry. Co. v. Little*, 48 N.E. 862, 863 (Ind. Supr. 1897).

4. TOFC stands for "trailer on flat car"; COFC. for "container on flat car."

railroad tracks. At Wilsmere these parking areas are along the north side of the railroad tracks. That is the side closest to the neighboring communities. The trailers, including refrigerated trailers, sit in these parking areas awaiting outbound shipment.

Since the refrigerated trailers contain perishable merchandise, the refrigeration units on these trailers must be operated while the trailers sit in the parking areas. The noise from these units, when aggregated, can be considerable. One investigator equated it "to the noise one would hear standing next to a highway as a stream of trucks passed in incessant review." A-94.

Moreover large numbers of refrigerated trailers accumulate in the parking areas. The peak number of refrigerated trailers handled daily at the Wilsmere yard is 120. A-88. For the twelve month period from August 1, 1983 through July 31, 1984, a total of 8,113 refrigerated trailers moved in and out of the Wilsmere yard. A-69. On average, these trailers leave the yard in three hours. Some, however, remain there as long as three days. A-85.

In May and June, 1984, following complaints from neighbors of the Wilsmere Yard, an investigator took measurements of the noise emissions from the refrigerated trailers. He concluded that the noise exceeded levels permitted under the regulations adopted pursuant to the Delaware Noise Control Act, 7 *Del. C.* §7101 *et seq*. On August 14, 1984, Secretary Wilson advised lawyers representing the Chessie group that the Delaware Department of Justice intended to file an action against the Chessie group to enforce Delaware's noise regulations.

b. Regulatory History

An awareness of the circumstances surrounding the promulgation of regulations by the EPA pursuant to 42 U.S.C. §4916(c) is critical to consideration of the issues presented by this appeal. Those circumstances demonstrate that the EPA withdrew proposed regulations governing noise emissions from parked refrigerated trailers not because it believed that such noise was best left unregulated but because it wished to settle a lawsuit brought against it by the American Association of Railroads ("AAR"). Direction from this Court is needed to clarify whether, under such circumstances, the EPA's decision not to regulate constitutes

preemption and therefore precludes state regulation of such noise.

The EPA published proposed emission standards for railroad operations on July 3, 1974. 39 Fed.Reg. 24580-24586. Initially, the EPA did not think that all railroad operations required nationally uniform standards. It explained that "railroad terminals and yards are normally permanent installations." 39 Fed.Reg. 24581. Noise from these facilities could be reduced by many methods which do not require national uniformity. *Id*. The agency reasoned that there was no need for nationally uniform treatment of such facilities.[5]

As a result, the EPA proposed only three federal noise standards. These initial proposals governed noise from moving locomotives, stationary locomotives and rail car operations. 39 Fed.Reg. 24586. The EPA published these proposals as final railroad noise emission standards on January 14, 1976. 41 Fed.Reg. 2184-2195.

This regulatory scheme was stillborn. In a lawsuit against the agency, AAR, an organization which promotes the interests of railroads, challenged the scope of EPA compliance with the congressional mandate.

Association of American Railroads v. Costle, 562 F.2d 1310 (D.C. Cir. 1977) held that the EPA had not met the scope of its congressional mandate by failing to promulgate standards for railroad facilities. The court found that Congress had explicitly directed the promulgation of standards for *all* equipment and facilities and ordered the agency to promulgate additional regulations.

On April 17, 1979, the EPA issued a notice of proposed rulemaking to comply with the court order in *Costle*. The agency

5. The State officials subscribe to the view that certain railroad operations must be protected from potentially conflicting state regulations by nationally uniform standards. The aggregation of stationary refrigerated trailers is not such an operation. The environmental significance of noise from such trailers depends on the proximity of residential communities, the number of trailers stored at the facility, and the presence of natural or man-made buffers. Such noise is a local concern and, as a result, does not require nationally uniform treatment.

commented, however, on the scheme for regulation of railroad noise which it would have preferred:

> We decided that railroad facility and equipment noise, other than locomotives and railcars, was best controlled by measures which did not require national uniformity of treatment. We wanted to leave State and local authorities freedom to address site specific problems, on a case by case basis, without Federal hindrance.

44 Fed.Reg. 22960. The agency noted that the *Costle* case, however, obligated it to broaden the scope of federal regulation considerably. As a result, the regulations promulgated in the notice of April 17 "include virtually all railroad facilities and equipment." *Id.*

Those regulations covered the following equipment and facilities: moving and stationary locomotives, rail car operations, car coupling operations, retarders, and, significantly, refrigerator car operations and receiving property standards. 44 Fed.Reg. 22967-22970. Some of these standards were stringent. The property-line standard, for example, created a violation for any noise in excess of 65dB. *Id.* Inevitably, AAR protested that the agency had gone too far.

AAR filed extensive comments to the proposed standards. It objected particularly to the property-line standard. This provided the catalyst for discussions between EPA and AAR which ultimately resulted in the settlement of the lawsuit. 47 Fed.Reg. 54108. The terms of the settlement were straightforward. AAR agreed to dismiss the *Costle* suit. In turn, the EPA agreed to withdraw some of the standards which it had promulgated. On November 24, 1981, the court dismissed *AAR v. Costle.*

By notice dated December 1, 1982, the EPA withdrew the standard for noise from stationary refrigerator cars. 47 Fed.Reg. 54107-54108. In so doing, the EPA did not state that it thought such noise was best left free from all regulation. Instead, it noted:

> The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a

> larger proportion of the noise emissions from railroad facilities. Since those standards addressed the major sources of noise from railroad operations, and since the cumulative effect of regulating equipment used within railyards is also to regulate, to a significant degree, noise emissions from rail facilities, it was agreed by the AAR, the State of Illinois and EPA that it is unnecessary for EPA to establish further property line facility emission standards.

47 Fed.Reg. 54108.[6] In a Status Report filed with the court with the Agreement to Dismiss, A-77-82, the agency commented further,

> Respondents agree with Petitioner AAR that EPA has already effectively regulated railroad "equipment and facilities" in a manner "consistent with the customary usage of the phrase in the railroad industry," 562 F.2d at 1321, and in a manner consistent with the criteria contained in Section 17 of the Noise Control Act, and that national uniformity of treatment is effectively assured as the Federal standards become effective.

A-80; reproduced at *Baltimore & Ohio Railroad Co. v. Oberly*, 606 F.Supp. at 1344.

2. The Course Of Proceedings And Disposition In The Courts Below

The Chessie Group initiated this action in the United States District Court for the District of Delaware seeking to have the Delaware Noise Control Act, 7 *Del. C.* §7101 *et seq.*, declared

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6. Existing standards cover moving and stationary locomotives and switcher locomotives, moving rail cars, retarder operations, car coupling operations, and load cell test stands. *See* 40 C.F.R. §§201.11 — 201.16. Although they cover equipment which "generate[s] a larger proportion of the noise emissions from such facilities", these standards do not cover noise from standing refrigerated trailers. Thus these standards do not limit the contribution which refrigerated trailer noise makes to the total noise level of the railyard.

unconstitutional as applied to them. On August 17, 1984, following application by the Chessie group, the district court temporarily restrained the State officials from enforcing the Delaware Noise Control Act or regulations adopted thereunder.

Following the agreement of the parties on a factual statement, the Chessie group's application for a preliminary injunction was briefed and argued. In their brief, the State officials argued that the preliminary injunction should be denied because, among other things, the Chessie group was unlikely to demonstrate that the Delaware regulatory scheme was preempted. Specifically, the State officials contended that Congress explicitly defined the extent to which state law was preempted: "Read literally, the statute preempts state regulation of noise from the operation of equipment and facilities where that noise is covered by a federal regulation." Defendants' Opening Brief Opposing Plaintiffs' Motion For A Preliminary Injunction at 16, *Baltimore & Ohio Railroad v. Oberly*, 606 F.Supp. 1340 (D.Del. 1985).

On April 9, 1985, the district court issued an order which imposed a preliminary injunction on the State officials. The court rejected the argument stating that "the EPA expressly considered and rejected standards for those noise sources that the State of Delaware is now seeking to control." 606 F.Supp. at 1345.

The State officials appealed that decision to the United States Court of Appeals for the Third Circuit. There they repeated their literal analysis of 42 U.S.C. §4916. Brief of Appellants at 27-28, *Baltimore & Ohio Railroad v. Oberly*, 782 F.2d 29 (3rd Cir. 1986). In addition, the State officials argued that EPA's withdrawal of a proposed standard for stationary refrigerated trailers did not amount to a decision that that equipment was best left unregulated. *Id.* 31-34.

The Third Circuit heard oral argument on November 18, 1985. At argument, the court elicited an agreement from both parties that it could consider the matter as if it had been appealed from an order imposing a permanent injunction on the State officials. On January 27, 1986, the Third Circuit issued its opinion and order affirming the imposition of the injunction for the reasons recited in the opinion of the district court. 782 F.2d at 30.

REASONS THIS COURT SHOULD GRANT PLENARY CONSIDERATION OF THE QUESTION PRESENTED

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW INVOLVING THE PRINCIPLES OF FEDERALISM AND REPUBLICANISM.

A. The Threat To Federalism

This Court has written on many occasions, and lately with increasing frequency, on the preemption of state law by federal statutes and regulatory schemes.[7] The Court has even discussed preemption in the context of a federal administrator's decision not to regulate a particular activity. *See Arkansas Electric Cooperative Corp. v. Arkansas Public Commission*, 461 U.S. 375 (1983); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). It has not, however, addressed the general question raised by the State officials in this appeal: under what circumstances will a federal decision to forego regulation in a particular field preclude state regulation as well.

Unlike *Arkansas Electric* and *Fidelity Federal* where the issue was not dispositive, *Ray v. Atlantic Richfield* represents the most explicit articulation of this branch of Supremacy Clause jurisprudence. In that case, there was no provision of the Ports and Waterways Safety Act of 1972 ("PWSA"), 33 U.S.C. §§1221 *et seq.* (1970 ed., Supp V), which expressly preempted states from setting standards for vessel size and speed limitations. The Court concluded, however, that §1222(b) "impliedly forbids higher state standards for vessels" because it permitted state imposition of more stringent standards "for structures only." 435

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7. *See, e.g., Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371 (1985); *Brown v. Hotel and Restaurant Employees and Bartenders*, 104 S.Ct. 3179 (1984); *Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694 (1984); *Silkwood v. Kerr-Mcgee Corporation*, 464 U.S. 238 (1984); *Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board*, 104 S.Ct. 2518 (1984); *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 137 (1963); *Rice v. Santa Fe. Elevator Corp.*, 331 U.S. 218 (1946); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

U.S. at 174. Moreover, the legislative history of the PWSA reflected congressional intent that "Coast Guard regulation of vessels preempt[ed] state action in this field." *Id.* The Secretary of the Department of Transportation had considered the area and had promulgated regulations prohibiting the passage of more than one 70,000 DWT vessel in either direction at a given time. Since this regulation addressed the area of vessel size, the State of Washington was precluded from enacting a statute which banned operations of oil tankers in the Puget Sound in excess of 125,000 DWT. The Secretary's decision "[took] on the character of a ruling that no such regulation was appropriate." 435 U.S. at 178 (Citations omitted).

This Court mentioned, but had no need to apply, the *Atlantic Richfield* holding in *Arkansas Electric Cooperative Corp. v. Arkansas Public Commission*. The Court observed that "a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate." 461 U.S. at 384.[8]

Neither of these decisions require that every federal agency failure to regulate be given preemptive effect. Clearly, the Court did not envision the indiscriminate application of the holdings in these cases. It said as much in *Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694 (1984). There Justice Brennan, writing for a unanimous Court, noted that the FCC's decision to preempt state and local regulation of cable television systems "represent[ed] a reasonable accommodation of conflicting policies." 104 S.Ct. at 2705. Relying expressly on *Ray v. Atlantic Richfield*, the *Capital Cities* Court wrote:

> And, as we have repeatedly explained, when federal officials have determined, as the FCC has here, that restrictive regulation in a particular area is not in the public interest, "States are not permitted to use their police power to enact such a regulation."

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8. *See generally NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (preemption by non-regulation will only extend to those unregulated fields which Congress or the federal agency designed to be free of all regulation).

Id.

What is required, then, is an agency's affirmative determination that state regulation is not in the public interest. Nothing in the history of the regulations enacted under 42 U.S.C. §4916 indicates that the EPA meant to preclude state regulation of stationary refrigerated trailers. At the most, the EPA's withdrawal of the refrigerated trailer standard evinces a preference that no *federal* standard extend to this equipment. Yet the courts below applied the holdings of *Atlantic Richfield* and *Arkansas Electric* indiscriminately.

The District Court's analysis went no further than to conclude that "the EPA expressly considered and rejected [as unnecessary] standards for those noise sources that the State of Delaware is now seeking to control." 606 F.Supp. at 1345. The Third Circuit merely incorporated this reasoning in its decision. 782 F.2d at 30. Neither court examined why the EPA deemed the regulation unnecessary. Such an examination is essential if the holding in *Ray v. Atlantic Richfield* and *Fidelity Federal* is not to be applied as a *per se* test.

Other courts have read *Ray v. Atlantic Richfield* to impose a *per se* test. The Ninth Circuit cited that decision to interdict a jury's consideration of the effectiveness of certain warning devices on locomotives because the Federal Railroad Administration had concluded that no federal requirement of such devices was necessary. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1153-1154 (9th Cir. 1983). And *Green v. River Terminal Railway Co.*, 585 F.Supp. 1019 (N.D. Ohio E.D. 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985) relied on the *Marshall* court's reading and concluded that any state attempt to require locomotive equipment not prescribed by federal regulation will fail. 585 F.Supp. at 1027.

A *per se* test imposing preemption whenever a federal agency considers but fails to enact a regulation substantially disrupts states' efforts at self-government. Inevitably during the course of a regulatory effort targeting a particular problem both federal and state officials can be expected to consider similar responses. A *per se* test would preclude state regulation in the face of federal inaction on such a response. Incredibly preemption

could occur even when the justification for federal inaction was the federal agency's belief that state regulation was a more desirable response. Given the potential that some federal agency may have considered and rejected a proposed regulation, state regulators would find themselves stymied in their efforts to address a problem of state interest. The definitive guidance of this Court is needed to stave off this threat to our system of federalism.

B. The Threat To Republicanism

The federal railroad noise regulations which were ultimately enacted were the product of a curious process. Through its manipulation of the legal and administrative system, the Association of American Railroads ("AAR") forced the EPA to promulgate federal standards to immunize it from the state regulation which the EPA initially considered a more effective response. *See* 39 Fed.Reg. 24580-24581. The EPA then attempted to do precisely what the *AAR v. Costle* court, at the insistence of AAR, had ordered. It promulgated regulations, some of which imposed stringent standards. AAR objected to the standards but its agreement to dismiss the lawsuit proved a far more effective way to fashion the regulations to its liking. For its part, the EPA was already a reluctant regulator. Forsaking proposed federal regulations which it deemed unnecessary from the outset was a small price to buy out of a lawsuit.

The influence which AAR exerted over the promulgation of the federal railroad noise regulations strikes at the core of a representative government which espouses equality as an ideal. *See generally* Sunstein, *Naked Preferences and the Constitution*, 84 Colum.L.Rev. 1689-1732 (1984) (arguing that the varying degrees of judicial scrutiny under certain constitutional provisions reflect judicial concern that the enactment resulted from the undue influence of special interest groups). Concerns over the representative character of our government generally motivate cautious intervention by the courts. Indeed this Court has observed that "[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people

through their elected representatives in Congress." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312-313 (1981) (Rehnquist, J.). In this case and its D.C. Circuit prelude, no similar caution informed the decisions of the courts. If the threat to our system of republicanism from the regulatory overreaching of special interest groups is to be avoided, it is respectfully submitted that this Court must voice its concern about the application of the Supremacy Clause to the facts of this case.

II. THE LOWER FEDERAL COURTS LACK A UNIFORM APPROACH TO THE APPLICATION OF THE HOLDING IN *RAY V. ATLANTIC RICHFIELD.*

The lower federal courts differ in their approach to applying this Court's holding in *Ray v. Atlantic Richfield*. Sometimes the differences appear in opinions of the same court. On other occasions, the differences occur between the circuits.

As previously noted, the Ninth Circuit imposed the holding as a *per se* rule in *Marshall v. Burlington Northern, Inc.* The Sixth Circuit did likewise in *Green v. River Terminal Railway Co.* And, in this case, the District Court and the Third Circuit approached the test in the same, indiscriminate manner.

In an earlier decision, however, the Ninth Circuit employed a case-specific analysis to a claim that the Federal Boating Safety Act of 1971, 46 U.S.C. §§1451-89 preempted Idaho's Outfitters & Guides Act, Idaho Code §§36-2101-2118 (1977 & Supp 1982). *Grand Canyon Dories, Inc. v. Idaho Outfitters & Guides Bd.*, 709 F.2d 1250 (9th Cir. 1983). There the court attached dispositive importance to the absence of any express federal action disapproving the state's statute and regulations. The Ninth Circuit read *Ray v. Atlantic Richfield* to result in preemption only when the federal regulator acts or decides that no requirement should be imposed and thereby expressly disapproves of the state scheme. 709 F.2d at 1255. The court grounded its reasoning on the literal language of the federal statute. That language permitted state regulation absent such disapproval.

Following a discussion of *Ray v. Atlantic Richfield*, the United States District Court for the Northern District of Florida

opined that the pervasiveness of the Federal Home Loan Board's regulatory scheme did not result in "wholesale preemption". *First Federal Savings & Loan Ass'n of Gadsden County v. Peterson*, 516 F.Supp. 732, 737-738 (N.D.Fla. 1981), *rev'd for want of subject matter jurisdiction*, 707 F.2d 1217 (11th Cir. 1983). It nevertheless concluded that the Board's explicit authorization of "due-on-sale" clause preempted the application of a Florida state court ruling that such clauses were unenforceable.

At the heart of this growing discord among the federal courts is the question of the proper application of this Court's holding in *Ray v. Atlantic Richfield*. The supervisory powers of this Court over the federal judiciary are needed to silence these differences.

III. THE DECISION BELOW IS INCORRECT

The lower courts in this case gave insufficient deference to the cardinal principle for analyzing questions involving express preemption provisions. The court's task is simply to give effect to the intent of Congress. *Brown v. Hotel and Restaurant Employees and Bartenders*, 104 S.Ct. 3179 (1984) (O'Connor, J.).

In this case, the parties agreed that the Noise Control Act of 1972, 42 U.S.C. §4901 *et seq*., contained an express preemption provision in §4916(c). The plain language of that section imposes preemption only when an applicable federal regulation exists. This is evident from the opening clauses: ". . . after the effective date of a regulation under this section . . . , no State or political subdivision thereof may adopt. . . " Only an existing regulation can have an effective date. A withdrawn standard relating to noise from refrigerated trailers obviously does not exist.

In addition, Congress specified that the existing regulation must be of a certain type. It must be a "regulation . . . applicable to noise emissions from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad." 42 U.S.C. §4916(c). Congress also identified the state regulations which these existing federal regulations will preempt. "[N]o State or political subdivision thereof may adopt or enforce any

standard applicable to noise emissions resulting from the operation of the *same* equipment or facility. . ." *Id*. Literally this language contemplates preemption of only those state standards which regulate noise emissions covered by a federal standard.

Legislative history supports this reading. During the final consideration of the bill which became the Noise Control Act of 1972, Senator Tunney, the Senate floor manager of H.R. 11021, offered this interpretation: "I would stress, Mr. President, that the preemption provided in these sections only occurs in areas of regulation where adequate Federal regulations are in effect." 118 Cong.Rec. 37318 (1972), *reprinted in*, A Legislative History of the Noise Control Act of 1972 at 40 (1974).

In all candor, the EPA did advise the Third Circuit by memorandum that the agency had preempted Delaware's regulatory efforts by that agency's questionable withdrawal of promulgated standards. A-20. This is clearly an improper reading of §4916 and the comments of Senator Tunney. Rather than reconcile its opinion to the language of the statute, the EPA justified its position on the ground that it had withdrawn regulations which would have governed refrigerated trailers. Such self-justification transgresses the cardinal principle of preemption analysis: it impermissibly consigns the views of Congress to a subordinate role.

In this case, the State officials sought to regulate noise from stationary refrigerated trailers. The federal regulatory history demonstrates that a standard which would have governed such noise was withdrawn. Based on a plain reading of the statute and its supporting legislative history, it can not be said that Congress intended to preclude the State officials from this course. To the extent the lower courts concluded otherwise, they are mistaken.

CONCLUSION

For all of the foregoing reasons, the State officials respectfully ask this Court to summarily reverse or grant plenary consideration of the question presented by this appeal.

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Charles M. Oberly, III
Attorney General of the
State of Delaware
Attorney for Appellant

Fred S. Silverman
State Solicitor

John J. Polk
Deputy Attorney General
Counsel of Record